**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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January 8, 2014

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner,<br><br>v.<br><br>NATIONAL CEMENT COMPANY OF ALABAMA, INC.,<br>Respondent. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | CIVIL PENALTY PROCEEDING:<br><br>Docket No. SE 2013-91-M<br>A.C. No. 01-00027-305686<br><br><br><br>Mine: National Cement Co. |

## DECISION[1]

Appearances:

Robert Hendrix, CLR, U. S. Department of Labor, Birmingham, Alabama on behalf of the Secretary

Jay St. Clair, Esq., Littler Mendelson, Birmingham, Alabama on behalf of National Cement Company, Inc.

Before: Judge David F. Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA"), against National Cement Company of Alabama, Inc. ("National Cement" or "the Company"). The case is brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 815, 820 (the "Mine Act"). The Secretary petitions for the imposition of a $540 penalty for one purported violation of 30 C.F.R. § 56.11001. The violation

[1] At the close of the hearing, I issued a bench decision in this matter. As I stated during the hearing, a bench decision is not final and is subject to change until a written decision is issued. Tr. 81. In this formal written decision, I retain my determination that the violation was not "significant and substantial" since any injuries that occurred would not be reasonably serious. However, as opposed to the bench decision, I conclude that there was a reasonable likelihood that the hazard would result in some form of injury. I also now conclude regarding the issue of gravity that the violation was not serious. These changes have been incorporated into the reproduction of the bench decision.

is alleged in Citation No. 8723305, issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. §814(a), at National Cement's cement plant in St Clair County, Alabama. Tr. 6-10.

This docket originally involved civil penalty assessments for five alleged violations at the plant at issue. Four of the violations were settled prior to the hearing. I approved these settlements in a Decision Approving Partial Settlement, issued on November 7, 2013. However, the parties were unable to settle the last remaining violation. The hearing on this single citation was held on November 13, 2013, in Birmingham, Alabama. Tr. 6-9.

Citation No. 8723305 reads as follows:

> Safe access is not being maintained to the access door in the chute between the cement coolers. Access was provided by laying an unsecured board that is approximately 1 foot wide over a 2 to 4 foot drop off [to the pit floor]. Miners travel to the access door approximately once every 3 months to clean out the chute. This condition exposes [a] miner to a slip and fall hazard likely to cause sprains, strains, bruises, and contusions.
>
> Standard [30 C.F.R. §] 56.11001 was cited 1 time in two years at [the] mine ([once] to the operator, [never] to a contractor).

Ex. P-1.

The parties do not dispute that the cited area consisted of two cement coolers, a chute between the coolers, a pit beneath the coolers, and a board that traversed the pit. Since the cement coolers cooled cement using water, the cited area was often wet. Cement had spilled from the cement coolers onto the board and the pit below. The pit was approximately 15 feet wide, and the chute was positioned roughly over the center of the pit. Therefore, the distance between an edge of the pit and the chute was approximately eight to ten feet. Handrails surrounded the edges of the pit. Exs. P-1, P-6; Tr. 24-30, 34-35.

The board was used as a temporary walkway to cross the top of the pit. The vertical distance between the board and the pit floor ranged from two to four feet. In this regard, cement had spilled onto some areas of the pit and hardened, causing varying depths in the pit floor. The areas of the floor which contained spilled cement were higher than other areas of the floor. The board was unsecured and lacked any railings or handrails. A few times a year, miners would walk eight to ten feet on the board to the chute, open the chute door, and clean the chute of clogged material. Exs. P-1, P-6; Tr. 24-30, 34-35.

On September 15, 2012, Timothy S. Schmidt, an MSHA inspector who was conducting an inspection of the mine, issued Citation No. 8723305. Ex. P-1; Tr. 23. The citation alleges a violation of 30 C.F.R. § 56.11001 which requires that "safe means of access shall be provided and maintained to all working places." The Secretary asserts that miners climbed over the

handrails surrounding the pit and walked across the unsecured board to access the chute door once every three months. Given that the board was narrow, unsecured, and wet (due to cement which had fallen on the board), the Secretary argues that using the board to access the chute constituted unsafe access to a working place, the chute door. Tr. 24-30. Specifically, the Secretary argues that the miner assigned to clean the chute could fall off the board onto the floor below, and this hazard, falling onto the pit floor, was reasonably likely to result in reasonably serious injuries such as a strain, sprain, bruises or contusions. Ex. P-1; Tr. 30-31, 36-37. The Secretary therefore asserts that the operator violated the safe access standard, and that the violation was "significant and substantial." Ex. P-1; Tr. 38-39.

The Secretary does not dispute that miners were provided and used fall protection when walking on the board across the pit. The Secretary concedes that the fall protection consisted of a harness and a backbiter lanyard, *i.e.* a lanyard that expands to provide shock absorption when the person using it slips and falls from an elevated position. According to the Secretary, typically such lanyards expand between three to six feet. However, since the pit was so shallow, the Secretary argues that the lanyard would be ineffective to prevent miners from hitting the pit floor. In other words, since the drop-off from the board to the pit floor varied from two to four feet, and since the lanyard expanded from three to six feet, the Secretary argues that it was reasonably likely that the lanyard would expand to the pit floor. Tr. 30-31, 56-58, 62-63.

The Secretary also argues that even if the lanyard prevented a falling miner from hitting the floor, the miner would still be likely to suffer serious injury. In this regard, the Secretary argues that the miner could sprain his ankle while slipping and falling from the board, or suffer blood clotting as he was suspended in mid-air. Tr. 30-31, 61-63.

The Respondent asserts that it did not violate the safe access standard since miners used fall protection that was fully effective, *i.e.* the miners' lanyards arrested their fall from the board, and prevented them from hitting the pit floor. In this regard, the Respondent points out that the Secretary's claim that miners who fell from the board would hit the pit floor despite using fall protection, was based on Inspector Schmidt's understanding of typical lanyards. However, as Inspector Schmidt testified, he was not aware of how the lanyard at issue was configured or anchored since he did not test the effectiveness of the lanyard. Inspector Schmidt also testified that he was not aware of the expansion length of the particular backbiter lanyard used by Respondent. Tr. 56-60.

The Respondent questions whether, even if miners hit the pit floor, the violation would be significant and substantial. In this regard, the Respondent questions whether it was reasonably likely that unsafe access would result in an injury given that there is no evidence any miner has ever fallen from the board, and given that miners need not use the board to access the chute; miners can also access the chute door through the ground floor of the mill room. Tr. 60, 67. The Respondent argues that even if miners hit the pit floor, their fall would be partially cushioned by the lanyards, and the resulting injuries would not be reasonably serious. Tr. 56-62.

Before calling his first witness, the Secretary read the following stipulations into the record:

> 1. The lanyard was provided by the Respondent[.]
>
> 2. [T]he distance between the board at issue and the floor below was less than six feet.
>
> Tr. 16-17.

The parties then presented their respective cases, and at the close of the testimony, I entered the following bench decision:

> The Secretary originally petitioned for an assessment of civil penalties for five alleged violations, four of which were settled. And I previously approved . . . the partial settlements, in a . . . Decision Approving Partial Settlement, which was issued by me on November 7[], 2013. The remaining issues are whether National Cement violated 30 C.F.R. [§] 56.11001 as alleged in Citation [No.] 8723305[,] issued on September [] 15[], 2012.
>
> [Tr. 85.]
>
> If so, was the violation ["significant and substantial", *i.e.* was the hazard contributed to by the violation reasonably likely to result in reasonably serious injury?] If so, was the violation . . . caused by the operator's moderate negligence as found by [MSHA] Inspector [Timothy S.] Schmidt?
>
> [Tr. 85.]
>
> First, was there a violation? I have no trouble finding [that] the Secretary proved a violation. Section 56.11001 requires two things. First, the operator must afford safe access to worksites, and two, [the operator] must make sure safe access is utilized. These principles are set forth in *Lopke Quarries,* 23 FMSHRC 705, [] 708 [(July 2001)] . . . . Here, Inspector Schmidt's testimony was compelling. I accept as a fact that to clean the clogged chute, miners accessed the work area via a foot-wide board. I do not dispute, as [Jeff] Golden[,] [National Cement's safety manager] testified, that [miners] could have accessed [the chute] from the ground floor of the mill room, but because their job would be more

easily performed from the board, I find this is the way they usually accessed the site.

[Tr. 85-86.]

I further find [that] the board was not safe for the following reasons. First, it was only a foot wide. Second, when [Inspector] Schmidt saw [the board,] it was partially covered with debris . . . [Third], the board itself was wet and could be slippery. I accept [Inspector] Schmidt's un-refuted testimony in this regard. [Fourth], the board was reached by climbing over a handrail, an act that in itself posed [a] hazard[,] as [Inspector] Schmidt testified. And [fifth], because the board extended over a two-foot to four-foot deep pit, the floor of which was . . . in some areas covered with accumulations of lumpy cement . . . . Inspector Schmidt [testified to all of the above] and all of it I accept.

[Exs. P-5, P-6; Tr. 86-87.]

Use of an effective lanyard might have provided miners with safe access, but I need not reach the issue of whether, in fact, [an effective lanyard did provide safe access] because I accept the essentially unrefuted testimony of the inspector [that the lanyard provided to the miners was not fully effective]. [T]he lanyard used at the mine by miners walking on and working from the board would not[,] in all instances[,] [prevent] a miner who lost his balance from falling to the floor of the pit . . . . Because the record confirms that in all instances the lanyards [which were] used were not effective to prevent an injury-causing accident, I find [that] safe access was neither provided nor maintained by National Cement. And for these reasons[,] I conclude that there was a violation.

[Tr. 87-88.]

[The next issue is] [n]egligence. The [I]nspector found [that] the Company was moderately negligent, and I agree. The degree of danger posed by the violation was moderate, and the Company failed to meet its commensurate duty of care when it allowed the board to be used without fully effective fall protection. The Company tried to provide effective protection [but] [t]he protection just wasn't effective enough.

[Tr. 88.]

[The next issue is] S & S and gravity. Here lies the crux of the case . . . . The Commission has explained that in order to . . . establish that a violation of a mandatory safety standard is S & S, the Secretary must prove [that four criteria have been met]. First, [the Secretary must prove] the underlying violation. Second, [the Secretary must prove] a [discrete] safety hazard[,] . . . a measure of danger to safety contributed to by the violation. Third, [the Secretary must prove] a reasonable likelihood [that] the hazard will result in an injury . . . And [fourth], [the Secretary must prove] a reasonable likelihood [that] the injury will be of a reasonably serious nature. [These criteria were] first enunciated in *Mathies Coal Company,* 6 FMSHRC 1, [3-4 (Jan. 1984).] And a host of progeny cases have reiterated and amplified the principles [underlying the four criteria].

[Tr. 88-89.]

Here[,] the Secretary proved the underlying violation and the discrete safety hazard, that is, the danger of falling and not being stopped short of hitting the concrete below. In this regard, I accept Inspector Schmidt's testimony that the board was wet and could be slippery. So I find that [the hazard at issue was] likely [to result in injury]. [Therefore, I find that the third *Mathies* criterion was satisfied.]

[Tr. 89-90.]

[However,] [a]lthough it is a close question, and although reasonabl[e] min[ds] certainly can differ [on the following issue], I find [that] the Secretary did not prove a reasonable likelihood that the fall would result in an injury of a reasonably serious nature . . . .

* * *

[Tr. 90.]

[First,] when [miners accessed the cited area], the record supports finding miners wore lanyards. Mr. Schmidt was told and did not dispute this [fact] . . . . The lanyards were not fully effective in that they would not, in all instances, perhaps even in most instances, prevent a miner from hitting the pit floor. But I find [that] they

provided some protection and that in some instances[,] they would prevent or lessen the impact [of] an expected injury.[2]

[Tr. 90-91].

[Second], the distance a miner could fall from two to four feet was not conducive to producing a reasonably likely injury of a reasonably serious nature.[3] [While] I agree [that] falls from under four feet can result in [fatalities] . . . . such circumstances are highly unusual. Here there was no contention [] by the [Secretary] that the expected falls of two to four feet, some of which could have been "cushioned" by fall protection[,] were reasonably likely to be fatal . . . . Inspector Schmidt [stated that] if an injury occurred, it was likely to lead to sprains, strains, bruises[,] cuts, or scrapes. I find that . . . bruises, cuts and scrapes . . . the inspector actually used the word contusions, but I translate that to cuts and scrapes, are not injuries of a reasonably serious nature in the context of this violation. And . . . while [strains or sprains] might be [reasonably serious injuries], [such injuries are not reasonably likely] to result from a fall [of] two to four feet.

[Tr. 91-92.]

Accordingly, I find that the violation is not S & S. [In making this finding] I recognize the experience and expertise of the inspector . . . . [His opinion is] entitled to great weight. But as I said, reasonable minds can differ and I conclude that under all the circumstances present here, an S & S finding is not warranted. Had the pit been uniformly deeper, had no lanyards been provided, or had the provided lanyards been totally ineffective . . . I might have found otherwise. But those are not the facts . . . before me . . . .

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[2] While it is unclear whether the lanyards, in most instances, would prevent miners from hitting the pit floor, I find that the lanyards, at a minimum, would lessen the impact of the fall. In this regard, Inspector Schmidt testified that backbiter lanyards typically expand three to six feet in order to provide shock absorption and lessen the impact of the fall. Inspector Schmidt failed to show that the lanyards at issue were configured such that miners would hit the pit floor before the lanyards began to expand. Tr. 30, 56-57. Therefore, I find that if miners slipped and fell from the board, the lanyards at issue would generally expand during the fall, and lessen the impact of the fall.

[3] In this regard, I find that since the pit was so shallow, even if the miner hit the floor, he would not suffer reasonably serious injuries.

[Tr. 92.]

I find [that] the violation was [not] serious . . . . [H]ere, as I've indicated, the evidence established that . . . the worst that was likely to happen would be a [bruise, cut or scrape that would result in no lost workdays to one person].

[Tr. 93.]

Having found a violation, I must assess a penalty. The penalty criteria mandate[] that I consider the operator's history of prior violation[s]. [The evidence] shows that the Company had 105 total violations at the plant in the two years prior to the violation at issue. Included in these violations were four violations of Section 56.11001. This is a significant history. I also must consider the appropriateness of the penalty to the size of the Company's business. And here the parties agree that the operator is of a medium size. I have found that National Cement was moderately negligent and [that] the violation was [not] serious. The parties agree that any penalty assessed will not affect National Cement's ability to continue with business, and that the Company demonstrated its good faith in abating the violation.

[Ex. P-8; Tr. 93-94].

Based on all the penalty criteria, I find that a penalty of $450 is warranted. I note that this penalty is consistent with other non-S & S penalties assessed and paid by the Company in the two years prior to the violation in question.

[Ex. P-8; Tr. 94.][4]

[4] Editorial changes correcting syntax, grammar, spelling and typographical errors have been made in reproducing the bench decision.

## ORDER

Within 30 days of the date of this decision, National Cement Company of Alabama, Inc., **IS ORDERED** to pay a penalty of $450 for the violation of 30 C.F.R. § 56.11001 set forth in Citation No. 8723305. Upon payment of the penalty, this proceeding **IS DISMISSED.**

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

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